

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA

CHANITO SALAZAR BACA,	)	
	)	
Petitioner,	)	CIV 08-8030 PCT GMS (MEA)
	)	
v.	)	REPORT AND RECOMMENDATION
	)	
P. RIDER, et al.,	)	
	)	
Respondents.	)	
_____	)	

14 TO THE HONORABLE G. MURRAY SNOW:

15           Petitioner filed a *pro se* petition for a writ of habeas  
16 corpus pursuant to 28 U.S.C. § 2254 on March 5, 2008. See  
17 Docket No. 1. Respondents filed an Answer to Petition for Writ  
18 of Habeas Corpus ("Answer") on September 9, 2008. See Docket  
19 No. 14. On October 21, 2008, Petitioner filed a pleading  
20 captioned as a motion to withdraw his habeas petition, which was  
21 signed by Petitioner on October 18, 2008. See Docket No. 15.

22           **I Procedural background**

23           Petitioner was found guilty of first-degree  
24 premeditated murder by a Navajo County jury. Answer, Exh. B at  
25 5. Petitioner was sentenced to a term of life imprisonment  
26 pursuant to this conviction. Id., Exh. B at 5. Prior to  
27 Petitioner's trial the state filed a motion in limine seeking to  
28 allow impeachment of Petitioner's credibility, if he chose to

1 testify, by introducing evidence of a prior felony conviction  
2 for burglary and a prior conviction for criminal damage. Id.,  
3 Exh. B at 3. The trial court reserved ruling on the motion in  
4 limine. Id., Exh. B at 3.

5 The testimony presented at Petitioner's trial indicated  
6 that he stabbed his victim after having an altercation with the  
7 victim earlier in the day. Id., Exh. E. Two witnesses  
8 testified the victim identified Petitioner by name as his  
9 assailant. Id., Exh. E. A witness testified Petitioner  
10 confessed stabbing the victim to them shortly after the crime.  
11 Id., Exh. B at 2 & Exh. E. An eyewitness to the crime testified  
12 she saw Petitioner stab the victim. Id., Exh. E at 170. This  
13 witness also testified she had been drinking and using  
14 methamphetamine prior to the commission of the crime. See id.,  
15 Exh. E at 99-101 & 117-18.

16 During presentation of the defense's case, a law-  
17 enforcement witness was shown a copy of a court record and the  
18 witness testified the record showed that the victim had  
19 previously been convicted of a felony. Id., Exh. G at 540-41.  
20 Upon cross-examination of this witness by the state, the witness  
21 was shown a copy of a court record and the witness testified the  
22 record showed that Petitioner had been sentenced to probation by  
23 the Navajo County Superior Court. Id., Exh. G at 540-41.<sup>1</sup> After  
24 this statement by the law-enforcement witness, Petitioner's  
25 counsel objected and moved for a mistrial. Id., Exh. E at 541-

---

26  
27 <sup>1</sup> The witness did not testify as to the crime committed by  
28 Petitioner for which he was placed on probation.

1 51 & Exh. B at 4. The jury was excused and argument heard, and  
2 the objection was sustained; however, the motion for a mistrial  
3 was denied. Id., Exh. E at 541-51 & Exh. B at 4. After the  
4 jury returned to the courtroom, the jury was instructed to  
5 disregard the question, and impliedly the answer, to which  
6 defense counsel had objected and to not speculate about the  
7 objection. Id., Exh. E at 551 & Exh. B at 4.<sup>2</sup>

8           Petitioner did not testify at his trial and his counsel  
9 argued during closing that the state had not met its burden of  
10 proving Petitioner had committed the crime. Id., Exh. B at 5.  
11 Counsel also argued that, alternatively, Petitioner's actions  
12 were self-defense or that the crime was manslaughter, rather  
13 than premeditated murder. Id., Exh. B at 5.

14           Petitioner filed a timely appeal of his conviction and  
15 sentence. Id., Exh. B at 5. Petitioner asserted in his direct  
16 appeal that: (1) the trial court abused its discretion by  
17 failing to grant a mistrial after evidence of Petitioner's prior  
18 conviction was introduced, which evidence was improperly  
19 elicited by the prosecutor; (2) he was denied his right to due  
20 process of law because a law enforcement witness was allowed to  
21 testify that Petitioner refused to submit to a warrantless  
22 search of his person, i.e., an intoxilyzer test and a DNA test;  
23 (3) the trial court erred by precluding a defense witness from  
24 testifying contrary to the testimony of the person to whom

---

25  
26           <sup>2</sup> The trial court stated: "Ladies and gentlemen, I sustained  
27 the objection to the last question. You're to disregard that question  
28 and also not to speculate as to why the objection was made. Thank  
you." Answer, Exh. G at 551.

1 Petitioner allegedly confessed, in violation of his federal  
2 Sixth Amendment right to present a defense to the charges  
3 against him. See id., Exh. B; Petition, Attach.

4 The Arizona Court of Appeals affirmed Petitioner's  
5 conviction and sentence in a decision issued August 23, 2005.  
6 See Answer, Exh. B. Petitioner did not seek review of this  
7 decision by the Arizona Supreme Court nor did he seek certiorari  
8 by the United States Supreme Court. Id. at 2.

9 Petitioner filed an action for state post-conviction  
10 relief pursuant to Rule 32, Arizona Rules of Criminal Procedure,  
11 on July 18, 2006. See id.; Petition, Attach. Respondents  
12 declare that Petitioner raised the claims stated in his federal  
13 habeas petition in the Rule 32 action filed July 18, 2006, and  
14 aver they have been unable to obtain a record of Petitioner's  
15 Navajo County Superior Court Rule 32 proceedings. See Answer at  
16 2.

17 The Navajo County Superior Court denied relief in the  
18 Rule 32 action, although it is not known on what basis, i.e.,  
19 waiver or default of the claims, or on the merits of the claims.  
20 Id. at 2 & Exh. C. The Arizona Court of Appeals denied review  
21 of the Superior Court's denial of Rule 32 relief in a decision  
22 issued November 30, 2007. Id., Exh. C.

23 Petitioner filed his section 2254 action on March 5,  
24 2008. Petitioner asserts he is entitled to federal habeas  
25 relief because his Fifth and Sixth Amendment rights were  
26 violated. Petitioner contends the state failed to disclose  
27 exculpatory evidence and also alleges that the prosecutor

28

1 engaged in misconduct by introducing improper evidence.  
2 Petitioner further maintains that he was denied his right to the  
3 effective assistance of trial counsel and that there was  
4 insufficient evidence to support his conviction. Petitioner  
5 seeks to have his sentence reduced to one commensurate with  
6 second-degree murder or manslaughter, arguing he could not  
7 properly be found guilty of first-degree premeditated murder  
8 because the murder weapon did not belong to Petitioner.

9 Respondents state that the petition "appears to be  
10 timely," but argue the petition must be dismissed because  
11 Petitioner failed to exhaust his federal habeas claims by  
12 presenting them to the Arizona Supreme Court. Answer at 3.

13 The Court concludes, for the reasons that follow, that  
14 Petitioner has properly exhausted his federal habeas claims by  
15 raising them before the Arizona Court of Appeals in his direct  
16 appeal and in his first state action for post-conviction relief;  
17 the prevailing legal precedent does not require that Petitioner  
18 raise his federal habeas claims before the Arizona Supreme Court  
19 to properly exhaust the claims.

20 **II Analysis**

21 **A. Exhaustion**

22 Absent particular circumstances, the Court should not  
23 entertain the merits of a petition for a writ of habeas corpus  
24 before the petitioner's state remedies have been "exhausted."  
25  
26  
27

1 See 28 U.S.C. § 2254(b) & (c) (2006 & Supp. 2008).<sup>3</sup> Although it  
2 may deny relief on the merits of an unexhausted claim, the  
3 District Court may not grant federal habeas relief on the merits  
4 of a claim which has not been exhausted in the state courts.  
5 See O'Sullivan v. Boerckel, 526 U.S. 838, 842, 119 S. Ct. 1728,  
6 1731 (1999); Coleman v. Thompson, 501 U.S. 722, 729-30, 111 S.  
7 Ct. 2546, 2554-55 (1991).

8 To properly exhaust a federal habeas claim, the  
9 petitioner must afford the state courts the opportunity to rule  
10 upon the merits of the constitutional claim by "fairly  
11 presenting" the claim to the state's "highest" court in a  
12 procedurally correct manner. See, e.g., Castille v. Peoples,  
13 489 U.S. 346, 351, 109 S. Ct. 1056, 1060 (1989); Rose v.  
14 Palmateer, 395 F.3d 1108, 1110 (9th Cir. 2005). The Ninth  
15 Circuit Court of Appeals has concluded that, in non-capital  
16 cases arising in Arizona, including cases in which a term of  
17 life imprisonment is actually imposed, the "highest court" test  
18 of the exhaustion requirement is satisfied if the habeas  
19 petitioner presented his claim to the Arizona Court of Appeals,

20

21

3

22

An application for a writ of habeas corpus on  
behalf of a person in custody pursuant to the  
judgment of a State court shall not be granted  
unless it appears that--

23

24

(A) the applicant has exhausted the remedies  
available in the courts of the State; or

25

(B)(i) there is an absence of available State  
corrective process; or

26

(ii) circumstances exist that render such process  
ineffective to protect the rights of the  
applicant.

27

28 U.S.C.A. § 2254(b)(1) (2006 & Supp. 2008).

28

1 either on direct appeal or in a petition for post-conviction  
2 relief. See Swoopes v. Sublett, 196 F.3d 1008, 1010 (9th Cir.  
3 1999). See also Crowell v. Knowles, 483 F. Supp. 2d 925, 932  
4 (D. Ariz. 2007) (providing a thorough discussion of what  
5 constitutes the "highest court" in Arizona for purposes of  
6 exhausting a habeas claim in the context of a conviction  
7 resulting in a non-capital sentence).

8           The Arizona Supreme Court has clearly stated that  
9 Arizona state court remedies are "exhausted," for federal habeas  
10 corpus purposes, after a defendant sentenced to a term of life  
11 imprisonment has been given each appeal to which he has a right,  
12 i.e., review by the Arizona Court of Appeals in a direct appeal  
13 or an action for state post-conviction relief pursuant to Rule  
14 32, Arizona Rules of Criminal Procedure. See Crowell, 483 F.  
15 Supp. 2d at 932 (D. Ariz. 2007); Arizona v. Sandon, 161 Ariz.  
16 157, 158 (1989); Arizona v. Shattuck, 140 Ariz. 582, 585 (1984).  
17 The Sandon court held that "[o]nce the defendant has been given  
18 the appeal to which he has a right, state remedies have been  
19 exhausted" and "the case in the Arizona courts is over." 161  
20 Ariz. at 158, 777 P.2d at 221.

21           Because Arizona criminal defendants do not have a right  
22 of direct appeal to the Arizona Supreme Court except in cases  
23 wherein the death penalty is actually imposed, see Arizona  
24 Revised Statutes Annotated § 13-4031 (2001 & Supp. 2007), and  
25 because they have no right to appeal the denial of  
26 post-conviction relief to the Arizona Supreme Court, any appeal  
27 to this "highest court" is a remedy that is "unavailable" to  
28

1 Arizona defendants sentenced to a term of life imprisonment  
2 within the meaning of Boerckel. In Crowell the District Court  
3 concluded: "Arizona has plainly removed discretionary State  
4 Supreme Court review from the standard review process for cases  
5 carrying life sentences..." 483 F. Supp. 2d at 933. The  
6 District Court determined, accordingly, that a petitioner  
7 sentenced to a term of life imprisonment had exhausted his  
8 federal habeas claims by submitting them to the Arizona Court of  
9 Appeals in a procedurally correct manner. Id.<sup>4</sup>

10 **B. Standard of review with regard to properly exhausted**  
11 **claims for relief**

12 "Habeas corpus is an 'extraordinary remedy' available  
13 only to those 'persons whom society has grievously wronged and  
14 for whom belated liberation is little enough compensation.'" Juan H. v. Allen, 408 F.3d 1262, 1270 (9th Cir. 2005), cert.  
15 denied, 126 S. Ct. 1145 (2006), quoting Brecht v. Abrahamson,  
16 507 U.S. 619, 633-34, 113 S. Ct. 1710, 1720 (1993).

17 The Court may not grant a writ of habeas corpus to a  
18 state prisoner on a claim adjudicated on the merits in state  
19

20  
21 \_\_\_\_\_  
22 4

23 In sum, the language in Swoopes on life sentences  
24 was dictum unnecessary for the correct  
25 disposition of that case. The subsequent  
26 repetition of that dictum as dictum in other  
27 cases does not change its character. Nor do any  
28 of the dicta undercut the clarity of the  
pronouncement by the Arizona Supreme Court,  
together with the 1989 enactments of the Arizona  
Legislature, that discretionary review in  
non-capital cases is 'unavailable' for purposes  
of federal habeas exhaustion. Petitioner  
sufficiently exhausted."

1 court proceedings unless the state court reached a decision  
2 contrary to clearly established federal law, or one involving an  
3 unreasonable application of clearly established federal law, or  
4 unless the state court's decision was based on an unreasonable  
5 determination of the facts in light of the evidence presented in  
6 the state proceeding. See 28 U.S.C. § 2254(d) (1994 & Supp.  
7 2008); Panetti v. Quarterman, 127 S. Ct. 2842, 2858 (2007);  
8 Carey v. Musladin, 549 U.S. 70, 127 S. Ct. 649, 653 (2006);  
9 Rompilla v. Beard, 545 U.S. 374, 390, 125 S. Ct. 2456, 2467-68  
10 (2005); Cook v. Schriro, 516 F.3d 802, 816 (9th Cir. 2008).

11 United States Supreme Court holdings at the time of the  
12 state court's decision are the source of "clearly established  
13 federal law" for the purpose of federal habeas review. Williams  
14 v. Taylor, 529 U.S. 362, 412, 120 S. Ct. 1495, 1523 (2000);  
15 Barker v. Fleming, 423 F.3d 1085, 1093 (9th Cir. 2005), cert.  
16 denied, 547 U.S. 1138 (2006). The Court must decide whether the  
17 United States Supreme Court has "clearly established" the point  
18 of law Petitioner relies upon as a basis for habeas relief by  
19 examining the holdings of the Supreme Court, rather than the  
20 opinions of the lower courts or the Supreme Court's dicta. See  
21 Carey, 127 S. Ct. at 653.

22 Unless United States Supreme Court precedent has  
23 clearly established a rule of law, the writ will not issue based  
24 on a claimed violation of that rule, see Alvarado v. Hill, 252  
25 F.3d 1066, 1069 (9th Cir. 2001), because federal courts are  
26 "without the power" to extend the law beyond Supreme Court  
27 precedent. See Dows v. Wood, 211 F.3d 480, 485 (9th Cir. 2000).



1 Fleming, 423 F.3d 1085, 1091-92 & n.3 (9th Cir. 2005), cert.  
2 denied, 126 S. Ct. 2041 (2006). When there is no "reasoned"  
3 state court decision explaining the state's denial of a claim  
4 presented in a federal habeas petition, the District Court must  
5 perform an independent review of the record to ascertain whether  
6 the state court's decision summarily denying the claim was  
7 objectively reasonable. See Medley v. Runnels, 506 F.3d 857,  
8 863 & n.3 (9th Cir. 2007), cert. denied, 128 S. Ct. 1878 (2008);  
9 Stenson, 504 F.3d at 890; Pham v. Terhune, 400 F.3d 740, 742  
10 (9th Cir. 2005).

11 If the Court determines that the state court's decision  
12 denying relief on the claim was contrary to clearly established  
13 federal law, the Court must determine whether Petitioner's  
14 constitutional rights were violated, i.e., the state's ultimate  
15 denial of relief, without the deference to the state court's  
16 decision that the Anti-Terrorism and Effective Death Penalty Act  
17 ("AEDPA") otherwise requires. See Frantz v. Hazey, 533 F.3d  
18 724, 734-36 (9th Cir. 2008). See also Larson v. Palmateer, 515  
19 F.3d 1057, 1061-62 (9th Cir.), cert. denied, \_\_\_ S. Ct. \_\_\_, 77  
20 U.S.L.W. 3201 (Oct. 06, 2008) (No. 07-11485).<sup>5</sup>

21 \_\_\_\_\_  
22 5

23 Under AEDPA, a federal court is permitted to  
24 grant habeas relief only if the state court  
25 adjudication "resulted in a decision that was  
26 contrary to, or involved an unreasonable  
27 application of, clearly established Federal law,  
28 as determined by the Supreme Court of the United  
States." 28 U.S.C. § 2254(d)(1). ... If the state  
court reaches the merits without providing  
reasoning for us to review, however, "we  
independently review the record to determine  
whether the state court clearly erred in its

1           Petitioner bears the burden of proving his  
2 constitutional rights were violated. See, e.g., Cook, 516 F.3d  
3 at 816. Additionally, a section 2254 writ of habeas corpus is  
4 available only when there has been a transgression of federal  
5 law binding on state courts. See Engle v. Isaac, 456 U.S. 107,  
6 119, 102 S. Ct. 1558, 1567 (1982); Middleton v. Cupp, 768 F.2d  
7 1083, 1085 (9th Cir. 1985). Habeas relief may not be premised  
8 on the mere allegation that something in the state court  
9 proceedings was contrary to general notions of fairness; the  
10 United States Constitution must specifically protect against the  
11 alleged unfairness before the petitioner may obtain relief. See  
12 Engle, 456 U.S. at 119, 102 S. Ct. at 1567; Middleton, 768 F.2d  
13 at 1088.

14           **C. The merits of Petitioner's claims for relief**

15           **1. Petitioner alleges that the prosecutor engaged in**  
16 **misconduct by introducing improper evidence, i.e., the fact that**  
17 **he had previously received a sentence of probation.**

18           Petitioner asserts that his Sixth Amendment right to a  
19 fair trial was violated, and his rights pursuant to Brady v.  
20 Maryland were violated, because the Navajo County attorney did  
21 not disclose to Petitioner or his counsel an exhibit, i.e., a  
22 probation report, which was the exhibit shown to the defense  
23 witness which elicited their statement that Petitioner had been

24 \_\_\_\_\_  
25           application of Supreme Court law." Brazzel v.  
26 Washington, 491 F.3d 976, 981 (9th Cir. 2007)  
          (internal quotation marks omitted).  
27 Larson v. Palmateer, 515 F.3d 1057, 1061-62 (9th Cir.), cert. denied,  
28 \_\_\_ S. Ct. \_\_\_, 77 U.S.L.W. 3201 (Oct. 06, 2008) (No. 07-11485).

1 placed on probation. Petitioner contends the introduction of  
2 this evidence prejudiced him notwithstanding the trial court's  
3 instruction to the jury regarding this testimony. See Petition  
4 at 6.

5           Petitioner alleges he exhausted this claim in his  
6 direct appeal. In his direct appeal Petitioner asserted the  
7 trial court abused its discretion by failing to grant a mistrial  
8 after evidence of Petitioner's prior conviction was introduced.  
9 Petitioner also alleged the prosecutor had improperly elicited  
10 the testimony that Petitioner had previously been convicted.  
11 Construing the claim as one asserting the trial court abused its  
12 discretion in denying a mistrial because there was erroneously  
13 admitted testimony, the Arizona Court of Appeals concluded  
14 Petitioner was not deprived of any right by the denial of the  
15 mistrial. The Court of Appeals concluded the curative  
16 instruction and that the "jury did not consider in deliberating  
17 their verdict that [Petitioner] had previously been convicted  
18 and placed on probation." Answer, Exh. B at 7. Accordingly,  
19 the Court of Appeals determined, there was no reasonable  
20 probability that the verdict would have been different absent  
21 the admission of this fact. Id., Exh. B at 7-8.

22           The Arizona Court of Appeals' decisions that Petitioner  
23 was not denied his right to due process of law or a fair trial  
24 because evidence of a prior bad act was admitted, and that the  
25 trial court did not err in denying the motion for a mistrial  
26 based on the introduction of the evidence, were not clearly  
27 contrary to federal law.

28





1           Given the testimony in this matter, i.e., that the  
2 victim identified Petitioner as his assailant to two people  
3 before he died, and the testimony of the eyewitness who watched  
4 Petitioner stab the victim, the fact that Petitioner had  
5 previously committed an infraction for which he received a  
6 sentence of probation was not likely to have had a substantial  
7 and injurious effect in determining the jury's verdict.  
8 Accordingly, the state court's decision in this regard was not  
9 clearly contrary to established federal law.

10           Petitioner also couches this habeas claim as one  
11 asserting prosecutorial misconduct and a violation of Brady v.  
12 Maryland. Petitioner alleges that the state failed to disclose  
13 evidence to him, i.e., the fact of his prior convictions and the  
14 state court docket report indicating he had been convicted and  
15 placed on probation, and that this "failure" violated his  
16 federal constitutional rights, citing Brady v. Maryland.

17           The United States Supreme Court held in Brady v.  
18 Maryland that a defendant's right to due process of law is  
19 violated when the government fails to disclose evidence that is  
20 material to the defendant's guilt or innocence. See 373 U.S.  
21 83, 87, 83 S. Ct. 1194, 1196-97 (1963).

22           This duty extends not only to exculpatory  
23 evidence but also to "evidence that the  
24 defense might have used to impeach the  
25 Government's witnesses by showing bias or  
26 interest." United States v. Bagley, 473 U.S.  
27 667, 676, 105 S. Ct. 3375 [] (1985).  
28 Evidence is material if "there is a  
reasonable probability that, had the evidence  
been disclosed to the defense, the result of  
the proceeding would have been different."  
Id. at 682, 105 S. Ct. 3375. To prove

1 materiality, a defendant need not demonstrate  
2 that it is more likely than not that he would  
3 have received a different verdict with the  
4 evidence; rather, 'reasonable probability' of  
5 a different result is ... shown when the  
6 government's evidentiary suppression  
'undermines confidence in the outcome of the  
7 trial.'" Kyles v. Whitley, 514 U.S. 419, 434,  
8 115 S. Ct. 1555, [] (1995) (quoting Bagley,  
9 473 U.S. at 678, 105 S. Ct. 3375).

7 Horton v. Mayle, 408 F.3d 570, 578 (9th Cir. 2005) (holding the  
8 government's failure to disclose a leniency deal with a witness  
9 was reversible error).

10 In order to prevail on a Brady claim presented in a  
11 federal habeas action, the petitioner must demonstrate that: (1)  
12 the evidence at issue was favorable to the petitioner, either  
13 because it was exculpatory or impeaching; (2) the evidence was  
14 suppressed by the government, either willfully or inadvertently;  
15 and (3) prejudice resulted. See, e.g., Strickler v. Greene, 527  
16 U.S. 263, 281-82, 119 S. Ct. 1936, 1948 (1999). If the  
17 petitioner was aware of the essential facts enabling him to take  
18 advantage of any exculpatory evidence at the time of his trial,  
19 however, the government does "not commit a Brady violation by  
20 not bringing the evidence to the attention of the defense."  
21 United States v. Brown, 582 F.2d 197, 200 (2d Cir. 1978), quoted  
22 in Raley v. Ylst, 470 F.3d 792, 804 (9th Cir. 2006).

23 Petitioner has not established a Brady violation. The  
24 state moved to introduce Petitioner's prior convictions at his  
25 trial. Petitioner himself knew of his prior convictions, and  
26 the prior convictions were not exculpatory. Accordingly, the  
27 state court did not err in concluding Petitioner's

1 constitutional rights were not violated by the alleged "failure"  
2 to disclose Petitioner's prior convictions to Petitioner.

3 **2. Petitioner further argues that he was denied his**  
4 **right to the effective assistance of trial counsel.**

5 To state a claim for ineffective assistance of counsel,  
6 a petitioner must show that his attorney's performance was  
7 deficient and that the deficiency prejudiced the petitioner's  
8 defense. See Strickland v. Washington, 466 U.S. 668, 690, 104  
9 S. Ct. 2052, 2066 (1984) (requiring the habeas petitioner to  
10 identify the specific acts of counsel which constituted their  
11 deficient performance to exhaust the claim); Moorman v. Schriro,  
12 426 F.3d 1044, 1056 (9th Cir. 2005) (holding a petitioner could  
13 not argue ineffective assistance of counsel claims in a habeas  
14 action if they had not raised the specific factual basis for the  
15 claim in the state courts), cert. denied, 126 S. Ct. 2984  
16 (2006); Longworth v. Ozmint, 377 F.3d 437, 448 (4th Cir. 2004).  
17 The petitioner must overcome the strong presumption that  
18 counsel's conduct was within the range of reasonable  
19 professional assistance required of attorneys in that  
20 circumstance. See Strickland, 466 U.S. at 687, 104 S. Ct. at  
21 2054.

22 To prevail on the merits of a habeas claim of  
23 ineffective assistance of counsel, "it is the habeas applicant's  
24 burden to show that the state court applied Strickland to the  
25 facts of his case in an objectively unreasonable manner. An  
26 unreasonable application of federal law is different from an  
27 incorrect application of federal law." Woodford v. Visciotti,

1 537 U.S. 19, 25, 123 S. Ct. 357, 360 (2002) (internal quotations  
2 omitted). "A fair assessment of attorney performance requires  
3 that every effort be made to eliminate the distorting effects of  
4 hindsight, to reconstruct the circumstances of counsel's  
5 challenged conduct, and to evaluate the conduct from counsel's  
6 perspective at the time." Strickland, 466 U.S. at 689, 104 S.  
7 Ct. at 2065. Indeed, "strategic choices made after thorough  
8 investigation of law and facts relevant to plausible options are  
9 *virtually unchallengeable*...." Id., 466 U.S. at 690-91, 104 S.  
10 Ct. at 2066 (emphasis added). To succeed on an assertion his  
11 counsel's performance was deficient because counsel failed to  
12 raise a particular argument the petitioner must establish the  
13 argument was likely to be successful, thereby establishing that  
14 he was prejudiced by his counsel's omission. See Tanner v.  
15 McDaniel, 493 F.3d 1135, 1144 (9th Cir.), cert. denied, 128 S.  
16 Ct. 722 (2007); Weaver v. Palmateer, 455 F.3d 958, 970 (9th Cir.  
17 2006), cert. denied, 128 S. Ct. 177 (2007).

18           Petitioner alleges he exhausted his ineffective  
19 assistance of counsel claim by raising it in his direct appeal.  
20 Petitioner contends his counsel's performance was deficient  
21 because counsel did not stipulate to Petitioner's prior  
22 convictions, allowing this information to be introduced at trial  
23 instead via the cross-examination of the defense witness with  
24 the probation report. The alleged error was not deficient  
25 performance; counsel attempted to keep the fact of Petitioner's  
26 prior convictions from the jury and moved for a mistrial when  
27 the fact that Petitioner had been on probation was elicited from

1 a defense witness. Additionally, any stipulation to the fact of  
2 a prior conviction would have allowed the introduction of the  
3 fact to the jury, albeit not in the manner which actually  
4 occurred during the trial. Furthermore, there is no indication  
5 that the alleged error was prejudicial to Petitioner; the  
6 overwhelming evidence introduced at his trial, including the  
7 eyewitness testimony, was more likely the reason for the jury's  
8 verdict than any assumption drawn from the fact that Petitioner  
9 was on probation.<sup>6</sup>

10 **Petitioner maintains there was insufficient evidence**  
11 **introduced at his trial to support his conviction.**

12 Petitioner contends his Fifth Amendment rights were  
13 violated because there was no evidence presented at the trial  
14 that the murder weapon belonged to him, or that connected him to  
15 the murder weapon, i.e., DNA or fingerprint evidence.  
16 Petitioner alleges he exhausted this claim by raising it in his  
17 first state action for post-conviction relief. Petitioner  
18 asserts the state denied this claim as waived because Petitioner  
19 did not raise the claim in his direct appeal.

20 An assertion that a verdict is against the "weight of  
21 the evidence," as distinguished from a claim that the evidence  
22 was legally insufficient, is not cognizable as a basis for

---

23  
24 <sup>6</sup> Ground III of the petition restates the claims made in  
25 Claim I and again alleges a violation of Plaintiff's Sixth Amendment  
26 rights by the introduction of the evidence that Petitioner had  
27 previously been convicted and placed on probation. The supporting  
28 argument in this section of the petition is extremely vague, and the  
undersigned concludes the claim is addressed in the section of the  
Report and Recommendation dealing with Petitioner's first claim for  
habeas relief.

1 federal habeas relief. See, e.g., Young v. Kemp, 760 F.2d  
2 1097, 1105 (11th Cir. 1985) ("A federal habeas court has no  
3 power to grant habeas corpus relief because it finds that the  
4 state conviction is against the 'weight' of the evidence ...");  
5 Ex parte Craig, 282 F. 138, 148 (2d Cir. 1922) ("a writ of  
6 habeas corpus cannot be used to review the weight of evidence  
7 ..."); Cameron v. Birkett, 348 F. Supp. 2d 825, 838 (E.D. Mich.  
8 2004). This is because a verdict against the weight of the  
9 evidence is not an error of federal constitutional dimension  
10 unless the record is so devoid of evidentiary support that a due  
11 process issue is implicated. See Cukaj v. Warren, 305 F. Supp.  
12 2d 789, 796 (E.D. Mich. 2004).

13           Accordingly, the test for federal habeas relief is not  
14 whether the verdict is against the great weight of the evidence,  
15 but whether there is sufficient evidence to support the verdict.  
16 See Dell v. Straub, 194 F. Supp. 2d 629, 648 (E.D. Mich. 2002).  
17 A District Court's review on habeas asks only the question of  
18 whether the evidence was constitutionally sufficient to prove  
19 all of the elements of the offense for which the petitioner was  
20 convicted. Cameron, 348 F. Supp. 2d at 838.

21           "[T]he Due Process Clause protects the accused against  
22 conviction except upon proof beyond a reasonable doubt of every  
23 fact necessary to constitute the crime with which he is  
24 charged." In re Winship, 397 U.S. 358, 364, 90 S. Ct. 1068,  
25 1073 (1970). To determine whether sufficient evidence was  
26 introduced at trial to support a habeas petitioner's conviction,  
27 the Court must decide if, "viewing the evidence in the light

1 most favorable to the prosecution, any rational trier of fact  
2 could have found the essential elements of the crime beyond a  
3 reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99  
4 S. Ct. 2781, 2789 (1979) (emphasis in original). See also Juan  
5 H. v. Allen, 408 F.3d 1262, 1276 (9th Cir. 2005), cert. denied,  
6 546 U.S. 1137 (2006). Additionally, a petitioner is not  
7 entitled to federal habeas relief if the evidence is merely  
8 susceptible to an interpretation other than the defendant's  
9 guilt. Jackson, 433 U.S. at 326, 99 S. Ct. at 2725; United  
10 States v. Beddow, 957 F.2d 1330, 1334 (6th Cir. 1992).<sup>7</sup>

11 Petitioner bears the burden of proving that the record  
12 is so totally devoid of evidentiary support for the challenged  
13 conviction as to violate due process. See Crow v. Eyman, 459  
14 F.2d 24, 25 (9th Cir. 1972). Circumstantial evidence is  
15 sufficient to support a petitioner's guilty verdict. Jackson,  
16 442 U.S. at 324-25, 99 S. Ct. at 2792; Jones v. Wood, 207 F.3d

---

17 7

18 The inquiry is based upon the entire record and  
19 the reasoning process actually used by the trier  
20 of fact, known or not, is not considered.  
21 [Jackson] at 319 n.13, 99 S. Ct. 2781 ("The  
22 question of whether the evidence is  
23 constitutionally sufficient is of course wholly  
24 unrelated to the question of how rationally the  
25 verdict was actually reached.").

26 The amendments to the habeas corpus statutes set  
27 forth in AEDPA have added an additional degree of  
28 deference to state courts' resolution of  
29 sufficiency of the evidence questions. See  
30 Valdez v. Ward, 219 F.3d 1222, 1237 (10th Cir.  
31 2000) (noting that, if a state court has  
32 addressed a sufficiency of the evidence claim,  
33 the federal court's review in a habeas proceeding  
34 is governed by § 2254(d)).

35 Torres v. Mullin, 317 F.3d 1145, 1151 (10th Cir. 2003).

1 557, 563 (9th Cir. 2000) (finding sufficient evidence to support  
2 a murder conviction when the "evidence was almost entirely  
3 circumstantial and relatively weak"); Sera v. Norris, 400 F.3d  
4 538, 547 (8th Cir. 2005) ("This case is similar to a host of  
5 others in which this Court affirmed convictions based solely on  
6 circumstantial evidence despite our recognition that alternate  
7 possibilities existed").

8           As noted supra, there was a great deal of evidence  
9 presented at Petitioner's trial that he was the individual who  
10 stabbed the victim, including eyewitness testimony and the  
11 statements of two witnesses that the victim told them Petitioner  
12 was the person who had stabbed him. Evidence was presented that  
13 Petitioner and the victim had argued earlier in the day.  
14 Accordingly, Petitioner was not convicted of first-degree  
15 premeditated murder, rather than second-degree murder or  
16 manslaughter, in violation of his right to due process of law or  
17 a fair trial.

#### 18           **IV Conclusion**

19           Petitioner properly exhausted his federal habeas claims  
20 by presenting them to the Arizona Court of Appeals in his direct  
21 appeal or in his timely state action for post-conviction relief.  
22 However, the state court's decision that Petitioner's federal  
23 constitutional rights were not violated as he asserts was not  
24 contrary to, nor an unreasonable application of federal law.  
25 Petitioner's motion to "withdraw" his habeas petition states  
26 that he does not have proper access to legal assistance and that  
27 he "has been procedurally denied proper state access to relief,

28

1 but upon this showing of cause and prejudice" asks the Court to  
2 dismiss his petition to allow him to exhaust his claims in the  
3 state courts. As noted supra, Petitioner has exhausted his  
4 claims and, accordingly, the motion to withdraw should be  
5 denied.

6

7 **IT IS THEREFORE RECOMMENDED that** Mr. Baca's Petition  
8 for Writ of Habeas Corpus be **denied and dismissed with**  
9 **prejudice.**

10

11 This recommendation is not an order that is immediately  
12 appealable to the Ninth Circuit Court of Appeals. Any notice of  
13 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate  
14 Procedure, should not be filed until entry of the district  
15 court's judgment.

16

17 Pursuant to Rule 72(b), Federal Rules of Civil  
18 Procedure, the parties shall have ten (10) days from the date of  
19 service of a copy of this recommendation within which to file  
20 specific written objections with the Court. Thereafter, the  
21 parties have ten (10) days within which to file a response to  
22 the objections. Pursuant to Rule 7.2, Local Rules of Civil  
23 Procedure for the United States District Court for the District  
24 of Arizona, objections to the Report and Recommendation may not  
25 exceed seventeen (17) pages in length.

26

27 Failure to timely file objections to any factual or  
28 legal determinations of the Magistrate Judge will be considered  
a waiver of a party's right to de novo appellate consideration

28

1 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,  
2 1121 (9th Cir. 2003) (en banc). Failure to timely file  
3 objections to any factual or legal determinations of the  
4 Magistrate Judge will constitute a waiver of a party's right to  
5 appellate review of the findings of fact and conclusions of law  
6 in an order or judgment entered pursuant to the recommendation  
7 of the Magistrate Judge.

8 DATED this 27<sup>th</sup> day of October, 2008.

9  
10  
11   
12 \_\_\_\_\_  
13 Mark E. Aspey  
14 United States Magistrate Judge  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28